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**McGuire Plumbing and Heating, Inc. and Plumbers and Pipefitters Local Union 178, affiliated with United Association of Plumbers and Pipefitters, AFL-CIO.** Cases 17-CA-19698-1, 17-CA-19698-2

February 12, 2004

**SUPPLEMENTAL DECISION AND ORDER**

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND MEISBURG

On March 4, 2003, Administrative Law Judge Thomas M. Patton issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent contends that the General Counsel has failed to prove that there were jobs available for both discriminatees. This contention raises matters that were resolved, some on the basis of the credibility of witnesses, in the underlying unfair labor practice proceeding and affirmed by the United States Court of Appeals for the Eighth Circuit. The Respondent is collaterally estopped from attacking these findings in this compliance proceeding.

The Respondent notes that each of the comparable employees (whose hours were used to estimate gross backpay) worked for the Respondent for less than the entire duration of the discriminatees' backpay period. The Respondent contends that it is therefore unreasonable to assume that the discriminatees would have continued working for the Respondent for the entire duration of the discriminatees' backpay period. Thus, it is argued that the backpay periods should be shortened. However, the Respondent has the burden of showing that a discriminatee would have stopped working for the Respondent at some time during the backpay period for reasons unrelated to the Respondent's unlawful actions. *Wellstream Corp.*, 321 NLRB 455, 461 (1996). The mere fact that other employees stopped working for the Respondent at various times during the backpay periods does not demonstrate that the discriminatees would likewise have stopped working for the Respondent at these same times. Accordingly, the Respondent has not met its burden of proof.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, McGuire Plumbing and Heating, Inc., Springfield, Missouri, its officers, agents, successors, and assigns, shall pay to Robert Vance a/k/a Bobby Gene Vance the sum of \$41,944.17 and to Dale Hankins the sum of \$8,221.09 plus interest<sup>1</sup> and minus tax withholdings required by Federal and State laws.

Dated, Washington, D.C. February 12, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Stanley Williams, Esq.*, of Overland Park, Kansas, for the General Counsel.

*Kenneth Shuler, Business Agent*, of Springfield, Missouri, for the Union.

*Charles F. Kiefer Jr., Esq. (Daniel, Powell & Kiefer, L.L.C.)*, of Springfield, Missouri, for the Respondent.

**SUPPLEMENTAL DECISION**

**STATEMENT OF THE CASE**

THOMAS M. PATTON, Administrative Law Judge. This is a backpay case. The Respondent/Employer is McGuire Plumbing and Heating, Inc. (the Respondent). The Charging Party Union is Plumbers And Pipefitters Local Union 178, affiliated with United Association Of Plumbers and Pipefitters, AFL-CIO (the Union). The underlying unfair labor practice case was the subject of a May 26, 1999 bench decision. The Board remanded the case on June 13, 2000, for reconsideration in light of the decision in *FES*, 331 NLRB 9 (2000). A supplemental decision issued on June 29, 2001, finding that the Respondent discriminated against employees Robert Vance a/k/a Bobby Gene Vance and Dale Hankins in violation of Section 8(a)(1) and (3) of the Act. No exceptions were filed to the supplemental decision, which was adopted by the Board on August 15, 2001. The Board's order was enforced by the United States Court of Appeals for the Eighth Circuit on March 6, 2002, in an unpublished judgment in Case 02-1294.

The Respondent was ordered to take affirmative action, including offering to hire Vance and Hankins and making the employees whole for any loss of pay or benefits they may have suffered as a result of the Respondent's unlawful refusal to

<sup>1</sup> Interest shall be computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

consider them for hire or hire them. A compliance specification issued on June 28, 2002, setting the matter for hearing and the Respondent filed its answer. A hearing was held in Springfield, Missouri, on October 1, 2002, to determine the formula and details for computing backpay.

All parties were given full opportunity to participate, produce evidence, examine and cross-examine witnesses, argue orally, and file briefs. Briefs were due November 6, 2002. The General Counsel and the Respondent filed briefs. The Respondent filed a motion to supplement record on November 5, 2003. The motion seeks to make a certified copy of the Missouri driver record for Vance a part of the record. I find that the Respondent has not shown that this is newly discovered evidence, evidence that has become available only since the close of the hearing, or evidence that should have been taken at the hearing. I further find that even if the exhibit were received, it would not change the decision. The motion is denied. The motion is made a part of the record in the case.

Upon the entire record, including my observation of the demeanor of the witnesses and after considering the arguments and briefs of the parties, I make the following

#### FINDINGS OF FACT

##### I. INTRODUCTION

In *Cobb Mechanical Contractors, Inc.*, 333 NLRB 1168, 1168 (2002), the Board defined the purpose of a backpay proceeding as follows:

In compliance proceedings, the Board attempts to reconstruct, "as nearly as possible," the economic life of each claimant and place him in the same financial position he would have enjoyed "but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). Determining what would have happened absent a respondent's unfair labor practices, however, is often problematic and inexact. Consequently, a backpay award "is only an approximation, necessitated by the employer's wrongful conduct." *Bagel Bakers Council of Greater New York v. NLRB*, 555 F.2d 304, 305 (2d Cir. 1977).

The Board's well-settled policy is that "[a backpay] formula which approximates what discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances." *La Favorita, Inc.*, 313 NLRB 902 (1994). Further, it is also well settled that any uncertainty in the evidence is to be resolved against the Respondent as the wrongdoer. See *Ryder/P\*IE\* Nationwide*, 297 NLRB 454, 457 (1989), enfd. in relevant part 923 F.2d 506 (7th Cir. 1991).

The General Counsel bears the burden of proving the amount of gross backpay due. The Respondent has the burden to establish facts that reduce the amount due for gross backpay. While the Respondent has the burden of showing the amount of any interim earnings, or a willful loss of interim earnings, it is the General Counsel's policy to assist in gathering information on this topic and to include that data in the compliance specification. See *Florida Tile Co.*, 310 NLRB 609 (1993).

The General Counsel has discretion in selecting a formula that will closely approximate the amount due. The Government

need not find the exact amount due nor adopt a different and equally valid formula that may yield a somewhat different result. See *NLRB v. Overseas Motors*, 818 F.2d 517 (6th Cir. 1987); *Kansas City Refined Helium Co.*, 252 NLRB 1156, 1157 (1980), enfd. 683 F.2d 1296 (10th Cir. 1982).

Section 102.56(b) of the Board's Rules and Regulations requires that as to all matters within the knowledge of a respondent, including the various factors entering into the computation of gross backpay, a general denial will not suffice. If a respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

Compliance Officer Robert A. Fetsch credibly testified regarding the preparation of the compliance specification, the source of factual information on which the specification is based and the rationale for the methods applied to compute backpay. The compliance officer's backpay formulation is a standard calendar quarterly computation provided for in *F. W. Woolworth*, 90 NLRB 289 (1950), with offsets for net interim earnings. Regarding interim earnings and mitigation efforts, the compliance officer utilized reports prepared by the employees, W-2 forms and employee interviews. The record shows that the employees secured their work through the Union's hiring hall and that when they were out of work during the backpay periods they registered at the hiring hall and they did not refuse referrals. Vance had no interim earnings for 6 of 11 quarters. The evidence that he was registered for referral from the hiring hall and did not refuse referrals was also supported by his testimony and the testimony of Union Business Agent Kenneth Shuler. Vance testified that he also registered for unemployment compensation.

The General Counsel seeks backpay plus interest for Vance and Hankins based upon the earnings of comparable employees, reduced by their admitted interim earnings. The General Counsel does not seek expenses or collateral losses. The Respondent disputes the alleged backpay periods, rates of pay, and hours used in the specification.

##### II. BACKPAY PERIODS

The beginning date of the backpay period for Hankins as alleged in the specification is April 17, 1998, the date of the unlawful refusal to consider or hire him. The specification alleges that the ending date of the backpay period for Hankins is June 3, 1999, the date the specification admits the Respondent made a written offer of employment to him.

The beginning date of the backpay period for Vance alleged in the specification is April 17, 1998, the date of the unlawful refusal to consider or hire him. The specification alleges that the ending date of the backpay period for Vance is November 1, 2000, the date that the specification admits Vance withdrew from the work force because of disability.<sup>2</sup>

<sup>2</sup> Vance testified that his disability was a consequence of Hepatitis C diagnosed in November 2000, at which time he applied for Social Security Disability (SSD). The record does not disclose the date of disability.

The Respondent argues that the alleged backpay periods for Vance and Hankins are incorrect because of limitations imposed on the employees by the Union. As union members, Vance and Hankins were ordinarily not free to work for nonunion employers like the Respondent. However, the Union consented to Vance and Hankins working for the Respondent to permit them to engage in organizing related activities, a practice known as salting. The Respondent contends that the evidence shows that Vance and Hankins were authorized by the Union to work as salts only until such time as they were hired and employed for a period of 1 day to 1 year. The Respondent argues that backpay accordingly should be limited to a 1-year period. The evidence does not, however, establish the factual premise of the Respondent's argument.

Vance and Hankins were not limited to working for Respondent for 1 year. Union Business Representative Shuler testified that there was no written salting agreement covering the employees and the record does not establish the purported limitations claimed by the Respondent. The testimony of Shuler, relied on by the Respondent on brief, is as follows:

Q. How long was your typical scenario where you would send a salt in, have them hired, and then say it is time to come back, we've got more work for you?

A. That varies.

Q. Okay. And what is that variation? What is the—your practice?

A. It could be from one day to a year.

Q. Okay. A year is the longest, and a day is the shortest?

A. If it takes longer, it takes longer.

The quoted testimony does not establish that the employees were limited to working for the Respondent for 1 year. Rather, it supports a contrary conclusion. Moreover, Schuller later credibly testified that there was no limit on how long a salt could work for a nonunion contractor.

The proposition advanced by the Respondent is also doubtful as a matter of law. It implicitly assumes that if the Respondent had hired Vance and Hankins and the Union attempted to enforce such a 1-year limit, the employees would not be free to resign from the Union and avoid union sanctions for continuing to work. I find it unnecessary to resolve that question.

The Respondent next argues that the Union's authorization for Vance and Hankins to work for the Respondent expired at the time of their subsequent referral to a union employer. The evidence that the Respondent relies on is testimony by Schuller that if Vance or Hankins wanted to reapply to work for Respondent after they resumed using the hiring hall they would first need to seek permission from the Union. Vance and Hankins each concededly had interim earnings from employment secured through the hiring hall and never reapplied to work for Respondent.

This contention has no merit. Neither employee had a duty to reapply. Rather, the Respondent had a continuing duty to offer them employment that was not extinguished by their

acceptance of interim employment. *Performance Friction Corp.*, 335 NLRB 1117 (2001). The record does not show that Vance or Hankins would not have been free under the Union's rules to accept an offer of employment from the Respondent at any time during the backpay period, had it been offered. Moreover, the discrimination was against the individual employees. The employees' rights to a remedy are not dependent on the Union's consent. Backpay continued to run until the Respondent made the offer of employment to Harkin and until Vance withdrew from the labor market. *Cobb Mechanical Contractors, Inc.*, 333 NLRB 1168 (2002).

In view of the foregoing, I conclude that the backpay periods alleged are appropriate.

### III. THE HOURS THAT THE DISCRIMINATEES WOULD HAVE WORKED

The specification alleges the number of hours for Hankin's gross backpay based upon the hours worked by employees David Blaskowsky (pay period ending 5/1/98 through pay period ending 4/22/99), and Joe Messina (pay period ending 5/7/99 through pay period ending 6/4/99).

The specification alleges the number of hours for Vance's gross backpay based upon the hours worked by employees Ronnie Wishon (pay period ending 6/19/98 through pay period ending 7/17/98), Thomas Pflumm (pay period ending 7/30/98 through pay period ending 11/13/98) and Colin Vaine (pay period ending 12/11/98 through pay period ending 10/27/00).

The testimony of Compliance Officer Fetsch and the documentary evidence show that Blaskowsky was the first comparable employee hired following the applications by Vance and Hankins. The specification assumes that absent discrimination Hankins would have been the first hired and that he would have worked the same hours as Blaskowsky and, after Blaskowsky ceased working for the Respondent, Hankins would have worked the number of hours worked by Messina, who was the next hired after Blaskowsky left.

The credited testimony of the Compliance Officer Fetsch and the documentary evidence similarly show that Wishon was the next hired after Blaskowsky. The specification assumes that absent discrimination Vance would have been hired and that he would have worked the same hours as Wishon, then Pflumm, who was the next hired following Wishon's departure and then Vaine, who was next hired when Pflumm ceased working for the Respondent.

The Supplemental Decision establishes that both Hankins and Vance had the training and experience to perform the work required in the positions filled in the year following the Respondent's refusal to hire them and that Respondent maintained a policy and practice of retaining and utilizing the employment applications of previously unsuccessful applicants on file for consideration when further openings occurred. Absent evidence to the contrary, it is reasonable to infer that the same was true regarding the balance of the backpay periods.

Compliance Officer Fetsch testified that the specification assumes that Hankins would have been hired first because Hankins was actually offered employment, apparently a reference to the June 3, 1999, offer that ended his make whole period. On brief the Respondent asserts that as between Vance

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ity he claimed in the SSD application or any Social Security finding regarding his disability date.

and Hankins, Hankins was better qualified. I conclude that it is reasonable to assume that Hankins would have been hired first and that the hours he would have worked are reasonably measured by the hours worked by Blaskowsky and Messina. I further conclude that it is reasonable to assume that Vance would have been the next person hired and that the hours he would have worked are reasonably measured by the hours worked by Wishon, Pflumm and Vaine. The applicable hours worked by Blaskowsky, Messina, Wishon, Pflumm and Vaine are established by the testimony of Compliance Officer Fetsch and the documentary evidence.

#### IV. WAGE RATES

The specification alleges that the wage rates paid to employee David Blaskowsky during the backpay period are appropriate to use to calculate the gross backpay owing to Vance and Hankins. Blaskowsky was hired on April 20, 1998 at \$10 per hour. He was the first comparable employee hired after Vance and Hankins were refused employment. Blaskowsky's wage increased to \$12 per hour for the pay period ending May 15, 1998, and increased again to \$12.50 per hour for the pay period ending December 11, 1998. Compliance Officer Fetsch testified that the Respondent's payroll records do not disclose a standard starting wage rate or a pattern for the amount and timing of pay raises for employees.

The answer to the specification denies that the use of Blaskowsky's wage rates is appropriate because the rate of pay for one employee has been used as the basis for calculating the backpay for two employees. The Respondent has not, however, proposed an alternative method of calculating backpay and no contention has been advanced that specific employees other than Blaskowsky should be used to calculate gross backpay.

As discussed above, the specification properly assumes that in the absence of discrimination Hankins would have been hired for the job opening filled by Blaskowsky. There is an objective and reasonable basis for using Blaskowsky's wage rates use to calculate the gross backpay owing to Hankins.

The use of Blaskowsky's wage rates to calculate Vance's gross backpay also has an objective and reasonable basis. Vance and Hankins have each been found qualified for the job filled by Blaskowsky. While the wages of other employees might arguably have been used to calculate Vance's gross backpay, the Respondent has not advanced such an alternative.

Accordingly, I conclude that the wage rates used to calculate gross backpay are appropriate. *Cobb Mechanical Contractors, Inc.*, 333 NLRB 1168 (2002). Cf. *Performance Friction Corp.*, 335 NLRB 1117 (2001).

The compliance officer also testified that a consideration in using Blaskowsky to calculate backpay was that when Hankins was offered a job on June 3, 1999, he was offered \$10 per hour and that at some unspecified time the Respondent had offered Vance a job at \$10 per hour. In reaching my conclusions regarding the wage rates I have not relied on this testimony.

#### IV. BACKPAY COMPUTATION

The specification alleges that the gross backpay for Vance and Hankins should be computed by multiplying the applicable rates of pay described above by the hours worked by Blas-

kowsky, Messina, Wishon, Pflumm, and Vaine. The specification further alleges that calendar quarter net backpay for the discriminatees is the difference between their calendar quarter gross backpay and calendar quarter net interim earnings. The alleged gross backpay, admitted net earnings and net backpay for Vance and Hankins, computed on a quarterly basis, are set forth in tables that are Appendix 1 and 2 to the specification. Those tables are attached and made a part of this decision as Appendix 1 and 2. The net backpay alleged for Vance is \$41,944.17. The net backpay alleged for Hankins is \$8,221.09.

There is no dispute regarding the correctness of the calculations. Accordingly, I find and conclude that Vance is entitled to \$41,944.17 in backpay, plus interest and that Hankins is entitled to \$8,221.09 in backpay, plus interest.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>3</sup>

#### ORDER

The Respondent, McGuire Plumbing And Heating, Inc., Springfield, Missouri, its officers, agents, successors, and assigns, shall make payments in the manner described below, plus interest,<sup>4</sup> minus tax withholdings on the backpay due to the employees as required by Federal and State laws.

Vance	\$41,944.17
<u>Hankins</u>	<u>\$ 8,221.09</u>
Total	\$50,165.26

Dated, San Francisco, California March 4, 2003

#### APPENDIX 1

#### BACKPAY CALCULATION

CASE NAME McGuire Plumbing  
CASE NUMBER: 17-CA-19698 (1-2)  
CLAIMANT: Robert Vance

YEAR	QTR.	GROSS BACKPAY	INTERIM EARNINGS	NET INTERIM EARNINGS	NET BACKPAY
1998	2nd	576.00	8,977.94	8,977.94	0.00
1998	3rd	4,536.00	0.00	0.00	4,536.00
1998	4th	4,483.75	1,195.93	1,195.93	3,287.82
1999	1st	5,631.25	0.00	0.00	5,631.25
1999	2nd	5,012.50	0.00	0.00	5,012.50
1999	3rd	6,793.75	0.00	0.00	6,793.75
1999	4th	3,775.00	0.00	0.00	3,775.00
2000	1st	5,731.25	2,421.90	2,421.90	3,309.35
2000	2nd	5,937.50	0.00	0.00	5,937.50
2000	2nd	6,143.75	3,167.10	3,167.10	2,976.65
2000	4th	1,812.50	1,128.15	1,128.15	684.35
<b>TOTAL</b>		<b>50,433.25</b>	<b>16,891.02</b>	<b>16,891.02</b>	<b>\$41,944.17</b>

<sup>3</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>4</sup> See *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

APPENDIX 2  
BACKPAY CALCULATION

*CASE NAME*        McGuire Plumbing

*CASE NUMBER:* 17-CA-19698 (1-2)

*CLAIMANT:*        Dale Hankins

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YEAR	QTR.	GROSS BACKPAY	INTERIM EARNINGS	NET INTERIM EARNINGS	NET BACKPAY
1998	2nd	3,935.00	8,080.69	8,080.69	0.00
1998	3rd	5,658.00	8,080.69	8,080.69	0.00
1998	4th	6,640.38	4,324.27	4,324.27	2,316.11
1999	1st	4,418.75	2,241.90	2,241.90	2,176.85
1999	2nd	3,728.13	0.00	0.00	3,728.13
<b>TOTAL</b>		<b>24,380.26</b>	<b>22,727.55</b>	<b>22,727.55</b>	<b>\$8,221.09</b>